80-463

No. 80-

Supreme Court, U.S.
FILED
SEP 23 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOMINION TOOL & DIE COMPANY, INC., PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE NATIONAL LABOR RELATIONS BOARD PROPERLY CERTIFIED THE RESULTS OF THE REPRESENTATION ELECTION.

   Subsidiary questions are:

   (A) WHETHER THERE WAS SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE TO SUPPORT THE NATIONAL LABOR RELATIONS BOARD'S DECISION AND ORDER.

   (B) WHETHER THE BOARD'S DECISION AND ORDER RESTS ON AN ERRONEOUS LEGAL FOUNDATION.

   (C) WHETHER A DIFFERENT TEST SHOULD BE USED IN REVIEWING A REPRESENTATION ELECTION WHERE THE OBJECTED TO CONDUCT IS NOT ATTRIBUTED TO THE UNION.

2. WHETHER THE NATIONAL LABOR RELATIONS BOARD ABUSED ITS DISCRETION, AND THEREBY COMMITTED PREJUDICIAL AND REVERSIBLE ERROR, IN PRECLUDING THE PETITIONER FROM EXAMINING WITNESSES AT THE HEARING, CONCERNING THEIR OPINIONS AND OBSERVATIONS OF THE CONDUCT, HABIT AND GENERAL REPUTATION OF, CERTAIN OF THE PERSONS WHOSE ACTIONS, IN GREAT PART, PROVIDED THE BASES FOR THE PETITIONER'S OBJECTIONS TO CONDUCT AFFECTING THE ELECTION.

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DOMINION TOOL & DIE COMPANY, INC., PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, DOMINION TOOL & DIE COMPANY, INC., a Michigan Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 26, 1980, denying Petitioner's Petition for Review and enforcing an Order of the National Labor Relations Board against the Company.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, and appears in the Appendix hereto, at App. 1a. The Decision and Order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 235 NLRB No. 12 and appears in the Appendix hereto at App. 1b. The Hearing Officer's Report and Recommendations on Objections and Challenged Ballots is not reported and appears in the Appendix hereto at App. 1d.

JURISDICTION

The judgment/order of the Court of Appeals for the Sixth Circuit was entered on June 26, 1980. This Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is being invoked under 28 USC x 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 158(a) It shall be an unfair labor practice for an employer. . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

United States Code, Title 29:

> Section 159(a) Representatives designated or selected by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to

rates of pay, wages, hours of employment, or other conditions of employment. . .

United States Code, Title 29:

Section 159(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall

direct an election by secret ballot and shall certify the results thereof.

United States Code, Title 29:

Section 160(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding

and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

United States Code, Title 29:

Section 160(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the Court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of

fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

United States Code, Title 28 (Federal Rules of Evidence):

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

STATEMENT OF THE CASE

A panel of the Court of Appeals enforced a Decision and Order of the National Labor Relations Board in which the Board, *inter-alia,* found that the Company had unlawfully refused to bargain with the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW), hereinafter referred to as the UAW. Additionally, the Court of Appeals denied the Company's Request for Review, thereby affirming the validity of the subject representation election.

A. FACTS

On May 7, 1976, the UAW filed a petition seeking to represent all production and maintenance employees of the Petitioner. On June 18, 1976, an election was held, pursuant to a Stipulation for Certification upon Consent Election, executed by the parties, and approved by the Regional Director for the Seventh Region of the National Labor Relations Board. The tally of ballots showed 27 votes cast for the UAW, 23 votes cast against the UAW, and 4 challenged ballots, making the challenged ballots determinative.

The Petitioner timely filed Objections to Conduct Affecting the Results of the Election. A hearing on these Objections was had before a Board Hearing Officer.

Pursuant to stipulation, one of the challenged voters was held to be ineligible to vote in the election. Accordingly, the remaining challenged ballots were no longer determinative of the results of the election. This stipulation resulted in there being 53 ballots cast with a possible net result of 27 voters being for representation, and 26 being opposed.

Prior to the election, certain of the "unit" employees resorted to threats, actual intimidation and physical assault in an effort to coerce the voters to cast their ballots in favor of the Union. The Company does not attribute this opprobrious conduct to the Union.

At the hearing, the Company demonstrated that there was an active grapevine in this relatively small and wide-open operation. Word spread fast and emotions ran high in the shop. One group of employees was pro-union and one group was not. On June 16, two days preceding the representation election, a union organizer physically assaulted and verbally abused a pro-company employee at a UAW meeting hall. This incident occurred in the presence of five to seven shop employees. As a result, a climate of fear and apprehension among the voters, was extant. On June 4, 1976, after a union organization meeting, another incident occurred. A pro-union employee engaged in a verbal assault on a pro-company employee. A third employee interceded, after the tirade lasted for about three minutes. There were 14 or 16 fellow employees present. This incident was amplified through the active grapevine in the shop.

Within two weeks of the representation election, verbal threats were made by another union adherent to a shop

employee, on at least three known occasions. Without doubt, these threats were made for the purpose of coercing the preference of this employee. Others were present. The individual who made these threats was a working leader in the department in which the threatened employee worked.

Another telling incident compels mention. Three or four minutes after the ballots were tallied, a menacing threat was made by a rabidly known union sympathizer, who was also a work leader, to a voter, known for his anti-UAW predilictions. The obvious question is, how many more employees were similarly approached — threatened and menaced — before the election, and how many of the electorate were coerced via the grapevine?

The evidentiary hearing on the Petitioner's Objections was conducted by a Hearing Officer. During the hearing, she made a fatally malignant evidentiary ruling to which the Company vehemently and repeatedly objected. The Company has without equivocation argued that the Hearing Officer committed prejudicial error in not allowing the Petitioner, by and through its counsel, to elicit testimony from key witnesses as to their observations of the conduct and general reputations of certain of the persons whose actions, in large part, provided the bases for the Employer's Objections to Conduct Affecting the Election. In short, she, without any substantial bases therefore, aborted the Company's right to due process.

B. THE BOARD'S DECISION AND ORDER

The Hearing Officer concluded that each and every one of the Employer's Objections should be held for naught (App. 1d). On January 31, 1977, the National Labor Relations Board issued a Decision and Certification of Representative in

which it adopted the Hearing Officer's Findings and Recommendations. Accordingly, the Board certified the results of the election, and certified the UAW as the exclusive representative of all bargaining unit employees. (App. 1c).

Thereafter, a Complaint was issued alleging that Petitioner had refused to bargain, in good faith, and, consequently, had engaged in, and was engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 29 USC 151, *et seq.*

A Decision and Order, dated March 13, 1978, was issued by a three member panel of the Board (App. 1b). It held, in effect, that Petitioner had wrongfully refused to engage in collective bargaining with the UAW and, therefore, had committed unfair labor practices within the meaning of the Act. The Board directed, in the Order, that Petitioner take certain actions (App. 9-11b).

C. DECISION OF THE COURT OF APPEALS

The decision of the panel of the Court of Appeals enforced the Board's Order in all respects. According to the Court of Appeals, the Board did not abuse its discretion in determining to certify the union and in not setting aside the results of the election. It further held that the findings of the "Administrative Law Judge" were supported by substantial evidence, and that there were no errors in evidentiary rulings requiring further proceedings.

The Court of Appeals cited absolutely no case law in support of its Order. It did not expressly address the numerous, key criteria that have been developed and recognized over the

years as the factors to be considered in determining the validity of a contested representation election. Rather, the Findings and Recommendations of the Board Hearing Officer, as were adopted by the Board, were, likewise, adopted by the Court of Appeals, in the enforcement order. Consequently, it is the Hearing Officer's Findings and Legal Conclusions, in particular, that must be scrutinized and relegated to their proper place of repose.

The test applied by the Board, and adopted as aforesaid, was:

> Whether the character of the conduct was so aggravated as to create a general atmosphere of fear of reprisal rendering a free expression of choice of representation impossible. (Citations omitted). (App. 11d).
>
> However, while conduct attributable to neither party to an election may be grounds for setting the election aside, the Board accords less weight to such conduct than to conduct of the parties. (Citations omitted). (App. 11d).

Finally, the Hearing Officer concludes,

> I cannot conclude that the effect of these incidents, even if known by every other member of the bargaining unit, created an atmosphere among employees of anxiety, confusion and fear of reprisal for voting against the union which rendered impossible a rational uncoerced choice as to bargaining representative and affected the results of the election. (Citations omitted). (App. 16d).

An absolute denial of industrial reality.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS AND AN EARLIER DECISION OF THE SIXTH CIRCUIT.

As stated earlier, the Sixth Circuit, below, made no findings or conclusions of law of its own. More particularly, it did not address the criteria regularly deemed relevant in similar matters, by the Sixth Circuit, itself. In fact, the Board does not expressly address the criteria, either. The gravamen of this is that the Sixth Circuit, in adopting the Board's decision, manifestly ignored the relevant criteria, thereby letting stand a completely erroneous test to be applied in determining whether the election should have been set aside. In *NLRB v. Mr. Porto, Inc., d/b/a Custom Display Studios,* 590 F.2d 637 (6th Cir., 1978), the Sixth Circuit expressly considered the size of the unit involved and the closeness of the election results. Instantly, the Sixth Circuit did not. The Court, in *Porto, supra,* stated that in light of the foregoing factors,

> it could not say that the illegal acts of the union were so remote "as to have no effect on election."

However, in *NLRB v. Basic Wire Products, Inc.,* 516 F2d 261 (6th Cir., 1975), the Sixth Circuit *seemed* to apply the "probable effect" standard. The general standards that were applied in the above-cited cases are distinguishable.

Regrettably, the conclusion is inevitable. It is evident that the panels of the Sixth Circuit are unable to agree on a general standard or test, much less the specific criteria which impart vitality and meaning to it.

In *NLRB v. Miramar of California,* 601 F.2d 422 (9th Cir. 1979), the Ninth Circuit adopted the following test:

> . . . whether the conduct and words of the union adherents among the Company's employees were so disruptive and so aggravated that a free expression of choice of representation among other employees was impossible. p. 424.

The Ninth Circuit, then, appears to apply the 'impossibility' test.

In *Exeter 1-A Limited Partnership v. NLRB*, 596 F.2d 1280 (5th Cir., 1979), the Fifth Circuit enunciated the following test:

> In order to be sufficient to set aside an election not only must conduct be coercive, but it must be so related to the election as to have a probable effect upon the employees' actions at the polls.

The Court also indicated that when a representation election is close, election midsconduct must be closely scrutinized. Further, it was held that the combined effect of the disruptive acts on the election must be considered. Here, the "probable effect" test was applied.

In *The Methodist Home v. NLRB*, 596 F.2d 1173 (4th Cir. 1979), the Fourth Circuit remanded the case to determine if an alleged incident had a "chilling effect" on the employees. The Court explained that the closeness of a representation election is a relevant factor, together with the closeness in time of the alleged misconduct to the election itself. It further indicated that if the conduct, though that of a union adherent and not that of a union agent or employee, is sufficiently substantial in nature to create a general atmosphere of fear and reprisal, such as to render a free choice of a representative impossible, then it will require the voiding of the election. A hybrid test is applied by the Fourth Circuit.

The Seventh and Fifth Circuits apply the 'tendency to influence test.' *NLRB v. Urban Telephone Corp.*, 499 F.2d 129 (7th Cir., 1974); *NLRB v. Gulf State Canners, Inc.*, 585 F.2d 757 (5th Cir., 1978). The Eighth and First Circuits apply the test of whether the misconduct renders a free expression of choice impossible. *NLRB v. Van Gorp Corp.*, ____ F.2d ____ (8th Cir., 1980); *NLRB v. Morgan Health Care Center*, ____ F.2d ____ (1st Cir., 1980).

These enumerated Circuit Courts of Appeal have applied different standards with different underlying criteria. **The difference is not one of semantics; it is one of substance.**

The need for the Court to promulgate a uniform set of criteria to be applied nationally, is evident. It is time now. To do so would be to advance stability, continuity, and useful precedent. To decline to do so, would be to imbed and reinforce the antonyms of the foregoing. Instantly, the Court of Appeals opted for a surface analysis by applying the "substantial evidence rule," in a vacuum. This approach is inappropriate and deflects the focus away from the real gut issues involved.

Accordingly, certiorari should be granted to resolve the conflict between the Circuits and between the different panels of the Sixth Circuit.

II. THIS CASE PRESENTS QUESTIONS OF SUBSTANTIAL AND RECURRING IMPORTANCE CONCERNING THE VALIDITY OF REPRESENTATION ELECTIONS UNDER THE NATIONAL LABOR RELATIONS ACT.

The difficult character of the issues presented in this case is evidenced not only by the split that now exists between the

Circuits, but also by the conflict between the Sixth Circuit's decision in the instant case, and its prior on point decisions. The resulting uncertainty is detrimental to the development and maintenance of our national labor policy, especially in so active a "labor" circuit.

This Honorable Court has ruled on numerous occasions, that the Circuit Courts of Appeal have the primary responsibility of reviewing Board decisions appertaining to representation matters. As a practical matter, it is one thing to say the former, but quite another, to afford each Circuit unchecked and seemingly total liberty to determine what, if any, criteria it wishes to apply to the same or similar circumstances. How may it possibly be argued that objectionable conduct sufficiently ominous to invalidate an election, in one jurisdiction, should be insufficient to invalidate a representation election in another? Could Congress have possibly intended such diversity?

A common thread woven through numerous Board and Circuit Courts of Appeal decisions is the premise that the "realities" of the work environment must be recognized. We do not maintain otherwise. Rather, the "reality" that predominates today, is that a group of employees in one region may be given a genuine opportunity to volitionally cast a ballot while in another, it is not. The same reasoning on "realities" highlights the fact that a frightened worker in Maine is no less frightened than one in Ishpenmay.

The uncertainty and lack of uniformity takes on added significance when considering the ever-increasing number of representation matters coming before the Circuit Courts of Appeal for review and enforcement. The confusion that exists and affects a large number of employers, employees and unions, can only be resolved by this Court. Especially, since

the confusion runs directly to the reason for being of this most important of all federal labor statutes.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WEISBERG and MEISNER, P.C.

By: ANTHONY B. MEISNER (P17596)
Attorneys for Petitioner

APPENDIX A

ORDER OF THE COURT OF APPEALS
(Filed June 26, 1980)

NO. 78-1187
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed June 26, 1980)

DOMINION TOOL & DIE COMPANY, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

BEFORE: LIVELY, KEITH and JONES, Circuit Judges.

Dominion Tool and Die Company petitions for review of an order of the National Labor Relations Board finding a violation of Section 8(a)(5) and (1) for its refusal to bargain with a certified union. The Board has filed a cross application for enforcement of its order. The Board's decision is reported at 225 N.L.R.B. No. 12.

Dominion concedes that the union was not involved in any illegal activities prior to the representation election, but contends conduct of employees who were union adherents destroyed the laboratory conditions required for a representation election.

A hearing was held on the objections of Dominion to the election. The administrative law judge filed a comprehensive opinion in which she dealt with each of the objections.

Upon consideration of the entire record together with the briefs and oral arguments of counsel the court concludes that the Board did not abuse its discretion in determining to certify the union and not to set aside the election. The findings of the administrative law judge are supported by substantial evidence and there were no errors in evidentiary rulings which require further proceedings.

Accordingly, the petition for review is denied and the order of the Board is enforced.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By: Barbara J. Burns
Deputy Clerk

ISSUED AS MANDATE: July 28, 1980
COSTS: to be recovered by the NLRB from the petitioner.

Filing Fees	$ -0-
Printing	$123.64
TOTAL	$123.64

APPENDIX B

DECISION AND ORDER OF THE BOARD
(Dated March 13, 1978)

FJP
D—3456
Roseville, Mich

235 NLRB No. 12

United States of America Before the
National Labor Relations Board

Dominion Tool & Die Company, Inc.

and

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW)

Case No.
7-CA-14305

Upon a charge filed on August 15, 1977, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) herein called the Union, and duly served on Dominion Tool & Die Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on August 24, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

Copies of the charge and complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 31, 1977, following a Board election in Case 7-RC-13631 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about January 31, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 30, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and submitting affirmative defenses.

On September 9, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with attachments, submitting in effect, that Respondent, in its answer, is attempting to relitigate issues which were or could have been litigated in the prior representation proceeding, Case 7-RC-13631. Subsequently, on September 22, 1977, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On September 26, 1977, Respondent filed a

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[1] Official notice is taken of the record in the representation proceeding, Case 7—RC—13631, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulatons, Series 8, as amended. See **LTV Elctrosystems, Inc.**, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); **Golden Age Beverage Co.**, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); **Intertype Co. v. Penello**, 269 F. Supp 573 (D.C.Va. 1967); **Follett Corp.**, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

response to the Motion for Summary Judgment and supporting memorandum, essentially reiterating the affirmative defenses raised in its answer. Respondent thereafter filed a response to Notice to Show Cause incorporating by reference its previous response and supporting memorandum.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its responses to the Motion for Summary Judgment and Notice to Show Cause, Respondent admits substantially all of the factual allegations of the complaint,[2] including its refusal to recognize and bargain with the Union which had been certified as the collective-bargaining representative of the employees described in the complaint. In its affirmative defenses to the complaint, as well as in its responses, Respondent attacks the validity of the Union's certification on grounds relating to the appropriateness and scope of the unit, its objections to the election, and the Hearing Officer's evidentiary rulings, and requests a further hearing. On January 31, 1977, the Board

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[2] By its answer, Respondent neither admits nor denies that the Union requested it to bargain since on or about January 31, 1977. However, Respondent admits it its answer that it has refused to bargain with the Union since on or about January 31, 1977. As Respondent admits that it has refused to bargain with the Union since on or about January 31, 1977, we find that no genuine issue of material fact exists.

issued a Decision and Certification of Representative in which it considered Respondent's objections to and determinative challenges in an election held on June 18, 1976,[3] and the Hearing Officer's report. The Board, after having reviewed the record in light of the exceptions and briefs, adopted the Hearing Officer's findings and recommendations that Respondent's objections be overruled, sustained the Hearing Officer's evidentiary rulings, and certified the Union, necessarily finding that Respondent did not raise substantial or material issues warranting further hearing.

By its assertions, and more specifically by its denials, in whole or in part, of the allegations of the complaint and the arguments propounded in its responses, the Respondent is attempting to relitigate the same issues which it raised in the representation proceeding, Case 7—RC—13631.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,

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[3] Respondent also neither admits nor denies the appropriateness of the unit set forth in the complaint. The election was conducted pursuant to a Stipulation for Certification Upon Consent Election, approved by the Regional Director, in which Respondent agreed to an election in said unit.

[4] See **Pittsburgh Plate Glass Co. v. N.L.R.B.,** 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan. At all times material herein, Respondent has maintained its only office and place of business at 15736 Sturgeon, Roseville, Michigan. Respondent is, and has been at all times herein, engaged in the manufacture and processing of dies and related products. During the year ending December 31, 1976, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at its Roseville, Michigan plant, products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said plant directly to points located outside the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including shipping and receiving employees and tool and die makers employed by the Respondent at its facility located at 15736 Sturgeon, Roseville, Michigan, but excluding all office clerical employees, technical employees and guards and supervisors as defined in the Act.

2. The certification

On June 18, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted pursuant to a Stipulation for Certification Upon Consent Election, under the supervision of the Regional Director for Region 7 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on January 31, 1977, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about January 31, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 31, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since January 31, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and

desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understnding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See **Mar-Jac Poultry Company, Inc.,** 136 NLRB 785 (1962); **Commerce Company d/b/a Lamar Hotel,** 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); **Burnett Construction Company,** 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Dominion Tool & Die Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including shipping and receiving employees and tool and die makers employed by the Respondent at its facility located at 15736 Sturgeon, Roseville, Michigan, but excluding all office clerical employees, technical employees and guards and

supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 31, 1977, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 31, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dominion Tool & Die Company, Inc., Roseville, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as the exclusive bargaining respresentative of its employees in the following appropriate unit:

> All production and maintenance employees, including shipping and receiving employees and tool and die makers employed by the Respondent at its facility located at 15736 Sturgeon, Roseville, Michigan, but excluding all office clerical employees, technical employees and guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Roseville, Michigan, plant copies of the attached notice marked "Appendix."[5] Copies of said notice, on

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 13, 1978.

JOHN H. FANNING, Chairman
HOWARD JENKINS, JR., Member
JOHN A. PENELLO, Member
(Seal) NATIONAL LABOR RELATIONS BOARD

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees and tool and die makers employed by the Respondent at its facility located at 15736 Sturgeon, Roseville, Michigan, but excluding all office clerical employees, technical employees and guards and supervisors as defined in the Act.

DOMINION TOOL & DIE
COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313-226-3244.

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WASHINGTON, D. C. 20570

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13b

APPENDIX C

DECISION AND CERTIFICATION OF REPRESENTATIVE

(Dated January 31, 1977)

Pursuant to the authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to and determinative challenges in an election[1] held on June 18, 1976, and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Hearing Officer's findings[2] and recommendations.

Certification of Representative

It is hereby certified that a majority of the valid ballots have been cast for International Union, United Automobile,

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 27 for, and 23 against, the Petitioner; there were four challenged ballots. During the hearing, the parties stipulated that employee J. C. Logan, whose ballot was challenged, was ineligible to vote since he shared no community interest with unit employees and had job duties different from those of the bargaining unit employees. The revised tally therefore shows only three challenged ballots, an insufficient number to effect the results.

[2] As for the Hearing Officer's refusal to admit evidence concerning the conduct and general reputation of certain employees, whose acts provided the bases for Employer's Objections, we find that the testimony in question was properly excluded on grounds that it would have unnecessarily prolonged the hearing. In our opinion, the Employer had ample opportunity to present its case and to present relevant and available evidence.

Aerospace, and Agricultural Implement Workers of America, (UAW), and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment:

> All production and maintenance employees including shipping and receiving employees and tool and die makers employed by the Employer at its facility located at 15736 Sturgeon, Roseville, Michigan, but excluding all office clerical employees, technical employees and guards and supervisors as defined in the Act.

Dated, Washington, D.C., January 31, 1977.

JOHN H. FANNING, Member
JOHN A. PENELLO, Member
PETER D. WALTHER, Member
(Seal) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS AND CHALLENGED BALLOTS

(Dated October 15, 1976)

United States of America Before the
National Labor Relations Board
Seventh Region

Dominion Tool & Die Company, Inc.
Employer

and

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW)
Petitioner

Case No.
7-RC-13631

Pursuant to a Stipulation for Certification upon Consent Election executed by the parties and approved by the Regional Director for the Seventh Region of the National Labor Relations Board on June 2, 1976, an election by secret ballot was conducted on June 18, 1976, among the Employer's employees in the following appropriate unit:

> All production and maintenance employees including shipping and receiving employees and tool and die makers employed by the Employer at its facility located at 15736 Sturgeon, Roseville, Michigan, but excluding all office clerical employees, technical employees and guards and supervisors as defined in the Act.

The payroll period for eligibility purposes was the weekly period ending May 29, 1976.

At the close of the election, a Tally of Ballots, showing the following results, was issued and copies were duly served upon the parties in accordance with the current Rules and Regulations of the Board:

Approximate number of eligible voters	54
Void ballots	0
Votes cast for Petitioner	27
Votes cast against participating labor organization	23
Valid votes counted	50
Challenged ballots	4
Valid votes counted plus challenged ballots	54

The challenged ballots, which were determinative of the ultimate election results, were received and segregated in a manner adequate to maintain their secrecy.

On June 24, 1976, the Employer timely filed, and thereupon immediately served a copy upon Petitioner, Objections to Conduct Affecting the Results of the Election. These Objections are, as follows:[1]

* * * * * * *

6. That the objections are based on, although not necessarily limited to, the following:

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[1] Only the substantive portions of the objections are set forth herein. Objections Nos. 1-5 serve as background for the allegations made in objections Nos. 6 and 7. Objections Nos. 8-12 are conclusionary allegations that allege no specific objectionable conduct.

Don Allen Midtown Chevrolet, Inc., 113 NLRB 879.

(a) **Employee Stephen C. Klimek:**

i. That employee Stephen C. Klimek, commonly known to be against unionization, was approached approximately two or three weeks prior to the election, immediately after a Union meeting, by employee Dan L. Cedras, commonly known to be sympathetic toward unionization, and that in the presence of other Cedras did make intimidating and menacing statements toward Klimek regarding his position on the issue of representation.

(b) **Employee David J. LaRocca:**

i. That employee David J. LaRocca, whose anti-unionization posture is commonly known, was physically assaulted by employee Dan L. Cedras, above-mentioned, at a Union meeting, at the Union hall, on June 16, 1976, and that the bases for said assult was his anti-union beliefs.

ii. That La Rocca approached, among others, Erich Domitter, President and one of three principal owners of Dominion Tool & Die Co., Inc., to apprise him of the assault and the reason therefor.

iii. That LaRocca indicated to Domitter his refusal to speak out for fear of further retribution from those entagonistic to his position.

iv. That the assault, and colloquy which thereafter ensued, was well known to Dominion employees.

v. That LaRocca is a friend and companion of employee Thomas J. Artushin, who is also commonly known to be against unionization, and that both LaRocca and Artushin are well known to and by Clark R.

Taylor, a salesman for Dominion, who was Dominion's designated observer at the presentation election.

vi. That Taylor, in his capacity as observer, took notice that LaRocca and Artushin, in uncharacteristic fashion and manner, "followed the crowd" by a substantial lag in time, in exercising their vote, and approached the ballot place hesitantly, nervously, and with some reservation as to whether they should cast ballots.

(c) **Employee Paul E. Lawlor:**

i. That employee Paul E. Lawlor was outspokenly opposed to unionization and that his feelings and beliefs were, and are, common knowledge to his fellow employees. That two or three times immediately preceding the election he was approached by employee Joseph C. O-Guin, commonly known to be sympathetic toward union representation, and warned that if the union were voted in that the committee would see to it that Lawlor was immediately let go. That these threats and incidents of harassment were commonly known throughout the shop area.

ii That immediately after the election Lawlor was approached by employee Dennis M. Hoeppner, a prime organizer on behalf of the Union, as well as the Union's designated observer, and was told that his position was precarious, to say the least. That this incident was also commonly known to the employees of Dominion.

7. That Hoeppner, who has had a history of being outspoken, belligerent, and arrogant among his fellow employees and who outspokenly advocated the cause of union representation was, in his capacity as the Union's designated observer, symbolic of threat, harassment, intimidation and insecurity to each and every Dominion employee who ap-

proached the balloting place, by virture of Hoeppner's mere presence there.

Inasmuch as the challenged ballots were sufficient in number to affect the results of the election, and a preliminary investigation indicated that the Employer's Objections and the challenged ballots raised substantial and material factual issues which could best be resolved through the medium of a hearing, the Acting Regional Director for the Seventh Region of the National Labor Relations Board issued a Notice of Hearing on June 29, 1976. Thereafter, on July 15, July 22, and August 5, 1976, a hearing was held before the undersigned for the sole purpose of determining the issues raised by the challenges and the Employer's Objections.

The hearing was conducted pursuant to and in accordance with the provisions of Sections 102.69(d) and (i) of the Board's current Rules and Regulations. All parties were represented and afforded full opportunities to be heard, to present and examine witnesses, to introduce relevant evidence, and to present oral arguments at the close of the hearing.

THE OBJECTIONS

I. Objections 6(a)(i), 6(b)(i) and (iv) and 6(c)(i):

A. Findings of Fact

Objection No. 6(a)(i): The Employer contends in this objection allegation that the employees' free election choice was interfered with by a known pro-union employee making intimidating and menacing statements to a known anti-union employee regarding his position on the issue of representation.

The record reveals that on or about June 4, 1976, after a meeting for employees held at the union hall, a group of

were voted in, all those who worked in the same job classification regardless of their tenure with the Employer would earn the same wage. Klimek specifically objected to his two brothers (who apparently had worked for the Employer several years less than Klimek in the same job classification) earning the same wage as he did and called his brothers some derogatory names. According to Cedras, he called Klimek a derogatory name in return for using such uncomplimentary terms regarding his own brothers. Walter Klimek, one of Stephen Klimek's brothers who was sitting in the area, did not hear what preceded Cedras' name calling of Stephen Klimek, and Grawburg's version of he interchange supports that of Cedras.

Whether or not Cedras' name-calling was precipitated by Stephen Klimek calling his brothers names, it is clear from the testimony that Cedras engaged in using relatively strong "shop language" in calling Klimek names because of Klimek's objection to his description of wages and job classifications which he believed would be effective if the Union were voted in. In fact, the use of the language was sufficiently loud and vulgar to cause Grawburg to caution Cedras to discontinue its use because they were in a public place.

Objection 6(b)(i) and (iv): The Employer contends in this objection allegation that the employees' free choice was interfered with by a known pro-union employee physically assaulting a known anti-union employee because of his position on the subject of union representation.

The record reveals that a meeting for employees was held at the regional union offices on or about June 16, 1976. After the meeting had ended, several employees stayed behind at the union office to consume pizza and beer and a group of six or seven were conversing at table. According to employee David LaRocca, who was not paying attention to the content of the

conversation, Dan Cedras suddenly struck him on the back of the head, accused him of "selling him out," and asked why he had done this. LaRocca responded that he wanted to talk to Cedras alone, and the two men then left the room, at which time Cedras apologized to LaRocca for his behavior. LaRocca testified that there were no union officials in the room when the incident took place. According to Cedras, the incident occurred differently. It began by Cedras inquiring of LaRocca whether he had informed the Employer that Cedras had been the employee who had started the Union's organizational drive. LaRocca stated he had not done this but admitted he had told this to Sonja Domitter, who he dated and who is the Employer president's daughter. Cedras testifed that he stated the Employer had "made it very bad for me within the plant." LaRocca then apologized and Cedras gave him a friendly tap on the side of the head and assured LaRocca that he understood his position and apologized for bringing up the subject at all. Of the three other employees who testified at the hearing who were present when this incident occurred, one was standing off to the side, possibly with his back turned, and saw nothing between LaRocca and Cedras. Another, who was sitting next to Cedras, saw Cedras and LaRocca shake hands, but did not see Cedras tap or strike LaRocca on the head, although he did hear them discussing whether LaRocca had told the Employer that Cedras was the employee who had started the Unions' organizational drive. A third employee, who witnessed the incident, saw Cedras' hand on LaRocca's shoulder but apparently could not discern whether Cedras had given LaRocca a friendly tap or a strike on the head.

Thus only the two participants of the incident give accounts of the complete sequence of events. Two of the three witnesses saw nothing of the alleged incident, and the third gave an account which is compatible with that of either LaRocca or

about 8-16 employees met at a nearby bar and discussed the relative advantages and disadvantages of organizing. Dan Cedras described what he believed would be the employees' wages and job classifications if the Union were their bargaining agent, and Stephen Klimek disputed him. At this point, the participants in and witnesses of the incident have divergent accounts of it. Approximately three employees were seated close to Cedras and Klimek, and two plus Cedras and Klimek, appeared as witnesses at the hearing. According to Stephen Klimek, when he disputed Cedras' claim that employees would earn higher wages and better benefits if the Union represented them, Cedras told him he did not know what he was talking about and proceeded to call him derogatory and vulgar names. According to Cedras, who admits he called Klimek some "choice names," Klimek objected to a possibility that Cedras had suggested that if the Union Cedras. Though LaRocca testified he does not know what Cedras said prior to striking him on the head, it is clear that whoever is credited, Cedras' strike or tap of LaRocca was related to Cedras' belief that LaRocca had informed the Employer he was the employee who was responsible for starting the Union's organizational campaign. The crucial question in evaluating this credibility conflict is whether Cedras, when confronting LaRocca with his belief, apologized for bringing it up after LaRocca admitted he had informed on Cedras and gave him a friendly tap, or whether he made the accusation in anger and struck LaRocca. I find it unlikely under the circumstances that Cedras' feeling at the time he confronted LaRocca was one of unconcern and charitable forgiveness. Further, I find that LaRocca, by his bearing and demeanor, was a more credible witness than Cedras, and therefore I credit his account of the incident.

Though none of the three employees who testified at the hearing on this objection allegation saw anything of any im-

port occur between LaRocca and Cedras on June 16, 1976, apparently there were some others who did, because word of the incident has spread among certain of the bargaining unit employees by the following day without LaRocca informing others of it. Though LaRocca told the two employees who asked him about the incident that Cedras apologized for his behavior, this apology was not witnessed by those employees who were present on June 16 at the union hall. What was witnessed by those employees was that Cedras had slapped LaRocca and accused him of telling the Employer that he was the one to start the Union's organizational drive in the plant. The record establishes that Dan Cedras was known to other employees to be in favor of unionization, but the fact alone that he struck LaRocca certainly does not establish that this was because of any anti-union beliefs LaRocca may have had. LaRocca, in fact testified that his feelings on unionization were not known among the employees and that he was undecided on the subject for quite some time. What employees witnessed was not a physical assault on LaRocca because of his position regarding the subject of unionization, but rather a display of anger by Cedras at believing that his role in the Union's organizational drive was exposed by LaRocca to the Employer. Though it is clear that news of Cedras' striking LaRocca spread to bargaining unit members, the incident was precipitated not by LaRocca's espousal of any views against the Union but rather by a personal feeling on the part of Cedras that LaRocca had betrayed him. What circulated among employees was only the fact that Cedras had struck LaRocca and not any reason as to why this had occurred. There was no evidence presented that established employees heard that Cedras had physically assaulted LaRocca because of his position on the subject of unionization. Inasmuch as the record reveals the reason was not related to LaRocca's stand on the subject of unionization, I cannot con-

clude that the information circulated among employees was that this was the reason for the assault.

Objection 6(c)(i): In this objection allegation, the Employer contends that one employee told another that if the Union were voted in, the employee would lose his job, and that this interfered with the free choice of employees at the election.

The only two witnesses who testified on this objection allegation were the two employees involved. According to Paul Lawlor, who was know to other employees in his department to be against unionization, on three different occasions in the four weeks prior to the election (after the petition in this case was filed), he had conversations with another employee in his department, Joseph O'Guin, about the advantages and disadvantages of having a union represent the employees. Lawlor was unclear on the specific details or times of each conversation, but he testified that when he brought up disadvantages of being represented by a union, O'Guin told him that if he were to talk that way, when the Union got in, the committee would "get" him and that he would not be working for the Employer any longer. O'Guin did not specify what committee he meant or what power it had to affect Lawlor's job tenure, and Lawlor apparently did not ask. O'Guin's testimony regarding this objection allegation was not vastly divergent from that of Lawlor, except that O'Guin testified that the conversation took place only once. According to O'Guin, Lawlor stated that if the Union were voted in, certain of the employees would take time off any time they wished. O'Quin responded that if the Union were voted in and Lawlor were in a position in which the Employer wanted to terminate him, the men on the committee would not "stand behind" him. According to O'Guin, Lawlor's response to his statement was laughter.

It is not clear whether this incident was circulated thoughout the bargaining unit. It is possible that two or three other employees working nearby in the same area as O'Guin and Lawlor overheard the interchange, but Lawlor himself mentioned te conversation to no other employees.

B. Legal Conclusions

The Employer did not contend nor was any evidence adduced at the hearing that Cedras or O'Guin were agents of the Union or that their behavior was attributable to it. However, the Board has set aside elections where certain conduct has created a general atmospheree among the employees of confusion and fear of reprisal for failing to vote for or to support the Union. **Sonoco of Puerto Rico,** 210 NLRB 493; **Steak House Meat Company, Inc.,** 206 NLRB 28; **Diamond State Poultry Co., Inc.,** 107 NLRB 3. The standard to be applied in determining whether an election will be set aside on the basis of conduct not attributable to one of the parties is whether the character of the conduct was so aggravated as to create a general atmosphere of fear of reprisal rendering a free expression of choice of representation impossible. **Price Brothers Company,** 211 NLRB 822; **Central Photocolor Company, Incorporated,** 195 NLRB 839, and cases cited therein at fn. 2. However, while conduct attributable to neither party to an election may be grounds for setting the election aside, the Board accords less weight to such conduct than to conduct of the parties. **Georgetown Dress Corporation,** 214 NLRB No. 108; **Orleans Manufacturing Company,** 120 NLRB 630, 633.

The Board attempts to establish conditions as ideal as possible for the conduct of its elections but has acknowledged that the facts of pre-election conduct must be appraised realistically and practically and not measured against ideal and artificial standards of human conduct. **Owens-Corning**

Fiberglass Corp., 179 NLRB 219. The Board in making such an appraisal has observed:

> "We are not unmindful of the fact that the 'laboratory' for election purposes is usually an industrial plant where vigorous compaigning and discussion normally take place, and where isolated deviations from the above-mentioned standard will sometimes arise, notwithstanding the best directed effort to prevent their occurrence." **Morgantown Full Fashioned Hosiery Co.**, 107 NLRB 1534; 1538.

Though the three aforesaid incidents will be considered together in arriving at a conclusion as to whether the atmosphere created among the employees was such as warrants setting aside the election, an analysis of each of the three incidents in light of the above general principles is appropriate.

With respect to the incident between Cedras and Klimek, there was no violence nor was there a threat of violence. What did occur was that Cedras called Klimek some vulgar names and told him he did not know what he was talking about, in an attempt to belittle his point of view that wages and job classifications would not be the way Cedras described them if the Union were to win the election. There was no prediction by Cedras of anything that might happen to Klimek if he failed to vote for the Union, nor, in fact, was the election ever mentioned. While Klimek probably found it unpleasant to be called vulgar names by Cedras in front of his fellow employees, I cannot conclude that Cedras' remarks could in any way have conveyed to Klimek or any other employee who witnessed the incident a fear of reprisal for not supporting the Union such as would interfere with their free choice as to representation at the polls two weeks later. It is my conclusion that the interchange between Cedras and Klimek was no more than a spirited discussion about union representation by two

employees whose ideas on this subject were diametrically opposed. It is unfortunate that Cedras lapsed into obscenities rather than pursue the argument on a more rational basis, but perhaps it is significant to note that Cedras had consumed some beer and that tongues seem to get a bit looser under these circumstances.

The Board has affirmed that where an employee calls others damned fools and jackasses if they voted for the Union, such conduct does not create an atmosphere of confusion and fear of reprisal such as would constitute election interference. **Georgetown Dress Corporation,** *supra*. Likewise, though the name-calling in this case was obscene and by far more uncomplimentary, I can see no cause, even if Klimek's version of the incident is credited, to set aside the election based on this incident.

With respect to the remarks made by O'Guin to Lawlor, there was an implied threat therein to Lawlor for not supporting the Union. In essence, O'Guin threatened that Lawlor could lose his job if the Union won the election and Lawlor continued to speak against it. In the context of the two men discussing the advantages and disadvantages of union representation, O'Guin explained that an unidentified committee would see to it that Lawlor would not continue working for the Employer. Though other employees may have been present in the area when this was said, there was no evidence presented to establish that they heard O'Guin's remarks and Lawlor testified that he did not tell any employees what O'Guin had said to him.

Though O'Guin's position at the Employer's facility is that of machinist leader, there was no evidence presented nor contention made that O'Guin was a supervisor within the meaning of the Act and had any power to affect Lawlor's job tenure. The Board has held on numerous occasions that when

a rank-and-file employee tells another that he will lose his job if he fails to support or vote for the Union, this does not constitute the type of threat of reprisal that establishes an atmosphere of fear and confusion which interferes with the employees' free election choice. The rationale has been that employees are generally capable of evaluating the source as lacking in authority to affect their jobs. **Georgetown Dress Corporation,** *supra;* **Monroe Auto Equipment,** 186 NLRB 90; **Southern Paper Box Company,** 207 NLRB 56; **Bufkor-Pelzner Division,** 197 NLRB 950; **Tunica Manufacturing Company, Inc.,** 182 NLRB 729; **Bona Allen, Inc.,** 190 NLRB 216. In addition, the threat in this case was conditional upon a union victory in the election. The Board has observed with respect to this type of conditional threat that such remarks are more likely than not to elicit a negative rather than a positive response toward unionization. **Monroe Auto Equipment,** *supra.* Accordingly, I conclude that O'Guin's statements to Lawlor did not create an atmosphere of confusion and fear of reprisal such as would interfere with the results of the election.

With respect to the incident between LaRocca and Cedras, though no violence was threatened, violence occurred, and news of the incident spread rapidly among employees via "the grapevine" at the Employer's facility. However, the violence that occurred was not because LaRocca was opposed to the Union and Cedras supported it, and no mention of either employee's position on this subject was made at the time. The reason for Cedras striking LaRocca was clearly Cedras' anger at believing that LaRocca had informed the Employer that Cedras was the employee who had started the Union's organizational campaign. The fact that only news of the blow to LaRocca and not the reasons for it spread among the bargaining unit does not convince the undersigned that bargaining-unit employees believed that they too would be

struck by Cedras if they did not vote for or support the Union. In a case involving a threat of physical violence by one employee to another related to a belief on the part of the former that the latter was talking about her to other employees, the Board affirmed the Administrative Law Judge's conclusion that threat was not related to the latter employee's anti-union sentiments and that it did not therefore interfere with the results of the election. **Owens-Corning Fiberglass Corp.,** *supra.*

Accordingly, since the striking of LaRocca by Cedras was not related to any opposition LaRocca may have had toward the Union, and could not reasonably have been interpreted so by other bargaining-unit employes who heard about the incident, I conclude that it did not create an atmosphere of confusion and fear of reprisal among employees which would warrant setting the election aside.

Taken together, I likewise conclude that the three incidents did not create an atmosphere among employees which interfered ith their free election choice and affected the results of the election. The incidents occuring herein are not akin to the threats of violence which the Board has found establish such an atmosphere of confusion and fear of reprisal that the election must be set aside. **Sonoco of Puerto Rico,** *supra;* **Steak House Meat Company, Inc.,** *supra.* In these cases, employees threatened others that they would be killed or hurt if they did not vote for the Union. However, the Board has recently held that even these types of threats do not always create an atmosphere of confusion and fear of reprisal among the employees which interferes with their free choice and warrants setting the election aside. **American Wholesalers, Inc.,** 218 NLRB No. 50.

In the case herein one employee struck another because he believed the other responsible for betraying his role in the

organizational drive to the Employer, the same employee called a third employee some vulgar names for disagreeing with him on the wages and job classifications which would be effective if the Union represented them, and a fourth employee told yet another that he could lose his job if the Union won the election. The Petitioner herein did not in any way lead employees to believe that it ratified or acquiesced in such conduct. I cannot conclude that the effect of these incidents, even if known by every other member of the bargaining unit, created an atmosphere among the employees of anxiety, confusion and fear of reprisal for voting against the Union which rendered impossible a rational uncoerced choice as to bargaining representative and affected the results of the election. **Masoneilan International, Inc.,** 223 NLRB No. 133. See also **Mike Yurosek & Sons,** 225 NLRB No. 20.

Accordingly, I recommend that Objections Nos. 6(a)(i), 6(b)(i) and (iv), and 6(c)(i) be overruled.

II. Objection 6(a)(ii):

In this allegation, the Employer claims that other employees were approached by Cedras or others in the same manner as Klimek was approached by Cedras. There was no evidence presented or adduced at the hearing to support this objection allegation. Accordingly, I recommend that Objection No. 6(a)(ii) be overruled.

III. Objections 6(b)(ii), (iii), (v) and (vi):

In support of its contention that the incident between LaRocca and Cedras created an atmosphere of confusion and fear of reprisal which interfered with the employees' free election choice, the Employer argues that conversations between LaRocca and certain supervisory personnel be considered. Testimony was given at the hearing that Employer President

Domitter was told by two or three bargaining unit employees on the morning of June 17, 1976, that LaRocca was "involved in some problems at the union hall" the preceding evening. Domitter asked LaRocca about this and LaRocca replied that Cedras had struck him. Immediately following the election, Domitter asked LaRocca if he would sign an affidavit on the incident, and LaRocca declined, stated he had to work with the employees involved. The Employer urges that this interchange shows that the incident between LaRocca and Cedras intimidated him to such an extend that his free election choice was affected.

In addition, the Employer argues that the time that LaRocca cast his ballot and his demeanor in doing so further establishes that he was so intimidated that his free choice was affected. The record establishes tha LaRocca and a fellow employee cast their ballots 15-30 minutes after the other bargaining unit employees, who lined up at one time when the polling session began. Clark Taylor, who served as the Employer's election observer, testified that when the two men came to vote, they seemed serious rather than carefree and cheerful like the other bargaining unit employees.

The fact that LaRocca and Artushin were serious or even tense as they came to cast their ballot may well tend to suggest that there was some doubt in their minds, as Taylor testified he believed there to be. It is illogical, however, to infer that this doubt was created by an atmosphere of confusion and fear of reprisal which was great enough to interfere with their free choice and, therefore, conclude that the election be set aside. A more likely interpretation would be that the two men were thinking about how they would vote and weighing the advantages and disadvantages of unionization. Laughter has been held not to interfere with the laboratory conditions of Board elections, and likewise, I cannot conclude that long

faces on two of the voters is ground for setting aside the election. As for the fact that LaRocca and Artushin cast their ballots well after the other employees, I know of no case or Board regulations that require voters to cast their ballots as soon as the polls open. As for the two conversations related above between LaRocca and Domitter, nothing in either one of them establishes that LaRocca was so intimidated by Cedras striking him that his free choice was affected.

Accordingly, I recommend that Objections Nos. 6(b)(ii), (iii), (v), and (vi) be overruled.

IV. Objection 6(c)(ii):

The Employer alleges in this objection that immediately after the election, an employee who was sympathetic to unionization made a threatening comment to another who was not.

There is no question that the interchange between the two employees did, in fact, take place after the polls had closed and the Tally of Ballots had issued. Therefore, it could not have affected the election results or interfered with the employees' free choice regardless of the nature of the remark or the fact that it may subsequently have become known to other bargaining unit employees.

The Employer, however, urges that the incident be considered as evidence that an atmosphere of fear and coercion existed among the employees prior to the election, and that the remark is a logical extension after the election of the atmosphere. According to Paul Lawlor, Dennis Hoeppner, who was an advocate of unionization, approached Lawlor, who was not in favor of unionization, after the results of the election were known and stated, "Your ass is grass and I am the mower." According to Lawlor, he had had no conversa-

tion with Hoeppner at any time prior to the election, and Hoeppner did not explain what he meant by this comment. Hoeppner testified that he had heard from other employees prior to the election that Lawlor had stated that if the Union won the election, he would hire an attorney. Hoeppner stated that he told Lawlor, after the election, "Go call your lawyer now, your ass is grass and I've got the lawnmower."

Although I find Hoeppner's version of the incident more credible, as it would seem unlikely for Hoeppner to make the remark Lawlor attributes to him in such an abrupt manner without explaining what he meant, neither version of the incident establishes that there existed an atmosphere of coercion and fear of reprisal such as would warrant setting aside the election. If Lawlor is credited, the unexplained sudden remark was sufficiently vague that it is not clear what Hoeppner meant. If Hoeppner is credited, it meant that Lawlor could hire an attorney to protest the election results but Hoeppner's cause, the Union, would win out in the end.

Inasmuch as I have concluded that Objection No. 6(c)(ii) cannot have affected the results of the election because it occurred after the balloting, and also that it does not establish that an atmosphere of coercion and fear of reprisal existed prior to the election, I recommend that Objection No. 6(c)(ii) be overruled.

V. Objection No. 7:

The Employer alleges in this objection that the employees' free election choice was interfered with by the presence of Dennis Hoeppner at the polling place.

The record indicates tht Hoeppner served as the Union's election observer during the election and, as such, was present at the polls throughout the balloting. There was no evidence

offered to establish that Hoeppner made any threatening or coercive statements to any of the employees during the polling session. Further, the Employer was aware of Hoeppner's serving as Union observer prior to the opening of the polls, and there is no indication that it objected to this.

The Employer contends that Hoeppner has a history of being outspoken and belligerent among his fellow employees and that because of this reputation, his presence at the polls intimidated voters to such an extent as would warrant setting the election aside. It appears from the record that Hoeppner was in favor of unionization and may, in fact, have been outspoken on the subject among his fellow employees. The NLRB Field Manual Section 11310 provides that election observers must be selected from among the Employer's non-supervisory employees and not be persons closely identified with the Employer. There is no requirement that the election observers be well liked among their fellow employees or have pleasant personalities. If Hoeppner had a reputation among the employees for being quarrelsome, contentious or arrogant, this would not disqualify him from service as an election observer. The fact that Hoeppner was in favor of the Union and made this known and may, in fact, have openly advocated unionization during the organizational campaign to other employees, as the Employer contends, likewise does not disqualify him from service as an election observer, as there is no proscription against employees closely identified with the Union serving as observers. The Board has held that even a union official can serve as an election observer for the union without any coercive effect on the voters if he is a non-supervisory employee of the Employer. **Soerens Motor Co.,** 106 NLRB 1388.

Accordingly, for the reasons stated hereinabove, I recommend that Objection No. 7 be overruled.

THE CHALLENGED BALLOTS

The Tally of Ballots issued at the close of the election show that the ballots of four employees were challenged. The challenges were as follows:

> K. E. Grawburg was challenged by the Employer because as a truck driver he is allegedly not in the unit.
>
> A. Cassise was challenged by the Petitioner because as a part-time janitorial employee she is allegedly not in the unit.
>
> M. Sandamair was challenged by the Petitioner because as the son of an owner of the Employer he is allegedly not eligible to vote.
>
> J. C. Logan was challenged by the Employer for unspecified reasons.

During the hearing, the parties stipulated the J. C. Logan was not eligible to vote in that he has no community of interest with the bargaining unit employees and his job duties are different from those of the bargaining unit employees.

Accordingly, I recommend that the following Revised Tally of Ballots issue:

Approximate number of eligilbe voters	54
Void ballots	0
Votes cast for Petitioner	27
Votes cast against participating labor organization	23
Valid votes counted	50
Challenged ballots	3
Valid votes counted plus challenged ballots	53

RECOMMENDATIONS

For the reasons stated above, the undersigned recommends that the Objections be overruled in their entirety and that the

Revised Tally of Ballots described immediately above issue. Since a majority of employees have cast ballots in favor of Petitioner, I further recommend that a Certification of Representative issues.

PLEASE TAKE NOTICE that within ten (10) days from the date of issuance of this report either party may file with the Board in Washington, D.C., an original and seven (7) copies of exceptions to such report with or without supporting brief, in duplicate. Immediately upon the filing of such exceptions, the party filing same shall serve copies thereof upon the other parties and shall file a copy with the Regional Director for the Seventh Region of the National Labor Relations Board, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan. Within seven (7) days from the last date when exceptions and supporting brief may be filed and if exceptions are filed, any party may file an original and seven (7) copies of any answering brief with the Board in Washington, D.C., except that if personal service of exceptions and supporting brief is made upon the Board, ten (10) days will be allowed. Service and proof thereof shall be made in an identical manner. If no exceptions are filed to the report, the Board may adopt the recommendations of the Hearing Officer or make other disposition of the case.

Dated at Detroit, Michigan, this 15th day of October, 1976.

(s) CAROL J. McCLOSKEY
Hearing Officer
National Labor Relations Board
Seventh Region
Patrick V. McNamara Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226

Supreme Court, U.S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-463

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOMINION TOOL & DIE COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board abused its discretion in refusing to set aside an election because of the conduct of a few employees who supported the union but who were not union agents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 1b-12b) is reported at 235 N.L.R.B. 68. The underlying representation decision (Pet. App. 1c-22d) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1980. The petition for a writ of certiorari was filed on September 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-6. Also relevant is Section 8(a)(1), 29 U.S.C. 158(a)(1), which provides:

> It shall be an unfair labor practice for an employer—
>
> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT

1. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") won a representation election among petitioner's employees by a vote of 27 to 23[1] (Pet. App. 1c n.1). Petitioner filed timely objections

[1] There were four challenged ballots. The parties stipulated that one ballot was cast by an ineligible employee. Since the remaining ballots would not have been determinative of the outcome, the challenges were not resolved (Pet. App. 1c n.1).

to the election, contending that certain pro-union employees engaged in conduct which interfered with the free choice of the employees in the election (Pet. App. 2d-5d). A hearing was held and the hearing officer made the following findings and conclusions:

a. Approximately two weeks before the election a group of eight to 16 employees met at a bar following a union meeting. Employee Dan Cedras, a known union proponent, described to those present what he believed would be the employees' wage and job classifications if the Union won the election; employee Stephen Klimek disagreed. Cedras called Klimek some vulgar names and told him he did not know what he was talking about. Another employee, Kenneth Grawburg, told Cedras to "take it easy" with the "loose language" because they were in a public place (Pet. App. 5d-6d; 8d; R. 136-137, 167-169, 259).[2]

The hearing officer concluded that the exchange between Cedras and Klimek was no more than a spirited discussion about union representation by two employees with different ideas on the subject. It was unfortunate that Cedras used profanity, but there was no violence or threat of violence. There was no evidence that either Klimek or any employee who witnessed the incident feared reprisal for not supporting the Union (Pet. App. 12d-13d).

b. Several days before the election a group of six or seven employees remained at the Union's offices after a meeting to have beer and pizza. Cedras, believing that employee David LaRocca had informed the Company that Cedras was the employee who started the Union's

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[2] "R." refers to the appendix filed in the court of appeals.

The first 16 lines of Pet. App. 8d should begin Pet. App. 6d. Compare R. 35-36.

organizing campaign, struck LaRocca on the back of the head and asked why LaRocca had sold him out. LaRocca then asked to speak with Cedras alone, because, according to LaRocca, he felt bad about being accused of selling Cedras out and he wanted to explain. After LaRocca had explained the situation, Cedras apologized for striking LaRocca (Pet. App. 6d-9d; R. 145-146).

The hearing officer found that Cedras had not struck LaRocca because of LaRocca's position regarding the subject of unionization. Cedras was angry because he believed that LaRocca had betrayed him by telling the Company about Cedras's role in the organizing campaign (Pet. App. 9d). LaRocca testified that, at the time of the incident, he was undecided on the subject of unionization and that his feelings on the subject were not commonly known among the employees. Word of the incident spread through the plant, but there was no evidence that employees heard that Cedras had assaulted LaRocca because of his thoughts about the merits of a union. In these circumstances, the hearing officer concluded that the other bargaining unit employees who heard about this incident could not reasonably have concluded that Cedras struck LaRocca because of his anti-union sentiments, or that they should fear reprisal by Cedras because of their union sentiments (Pet. App. 9d-10d).

c. During a discussion of the advantages and disadvantages of union representation with known anti-union employee Paul Lawlor, pro-union employee Joseph O'Guin told Lawlor that when the union got in the "committee" would see to it that Lawlor would not continue working for the Company (R. 129-130). O'Guin did not specify what committee he meant or what power it had to affect Lawlor's job. Moreover, although other employees may have been present in the area during this

conversation, there was no evidence that they heard what O'Guin had said. Lawlor testified that he did not tell any employee what O'Guin had said to him (Pet. App. 10d-11d; R. 129-130).

The hearing officer pointed out that O'Guin had no power to affect Lawlor's job tenure and explained (Pet. App. 13d-14d; citations omitted):

> [W]hen a rank-and-file employee tells another that he will lose his job if he fails to support or vote for the Union, this does not constitute the type of threat of reprisal that establishes an atmosphere of fear and confusion which interferes with the employees' free election choice. The rationale has been that employees are generally capable of evaluating the source as lacking in authority to affect their jobs.

The hearing officer concluded that none of these incidents created an atmosphere of fear and reprisal sufficient to warrant setting aside the election.[3]

Then considering the cumulative impact of the incidents, the hearing officer concluded that there was no basis for setting aside the election (Pet. App. 15d-16d; citations omitted):

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[3]After the results of the election were known, employee Dennis Hoeppner, who had served as the Union's observer at the election, told employee Lawlor, "Go call your lawyer now, your ass is grass and I've got the lawnmower." Hoeppner testified that he had heard prior to the election that Lawlor had said that if the Union won the election he would hire an attorney (Pet. App. 18d; R. 196). The hearing officer concluded that Hoeppner's comment merely meant that Lawlor could hire an attorney to protest the election results but that the Union would win. In any event, since the remark occurred after the balloting was over, it could not have had any effect on the results of the election (Pet. App. 18d-19d).

> In the case herein one employee struck another because he believed the other responsible for betraying his role in the organizational drive to the Employer, the same employee called a third employee some vulgar names for disagreeing with him on the wages and job classifications which would be effective if the Union represented them, and a fourth employee told yet another that he could lose his job if the Union won the election. The [Union] herein did not in any way lead employees to believe that it ratified or acquiesced in such conduct. I cannot conclude that the effect of these incidents, even if known by every other member of the bargaining unit, created an atmosphere among the employees of anxiety, confusion and fear of reprisal for voting against the Union which rendered impossible a rational uncoerced choice as to bargaining representative and affected the results of the election.

2. The Board adopted the findings and conclusions of the hearing officer and certified the Union as the bargaining representative for petitioner's employees (Pet. App. 1c-2c). Petitioner refused to bargain. Based on a charge filed by the Union, the Regional Director issued a complaint against the Company. After the Company filed its answer, General Counsel moved for summary judgment, and the Board granted the motion, finding that petitioner's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App 7b). The Board ordered petitioner to bargain with the Union (Pet. App. 9b-10b).

3. The court of appeals enforced the Board's order. The court held that the findings of the hearing officer were "supported by substantial evidence and there were no errors in evidentiary rulings which require further proceedings" (Pet. App. 2a).

ARGUMENT

In evaluating the probable effect of alleged threats, intimidation and coercion upon the outcome of an election, the Board has long held that "conduct of third persons tends to have less effect upon the voters" than similar conduct by employers or unions. *Orleans Mfg. Co.*, 120 N.L.R.B. 630, 633 (1958). Only if the third party conduct is found to have "created an atmosphere rendering a free election impossible" (*id.* at 634) will the election be set aside. As explained in *NLRB* v. *Sauk Valley Mfg. Co.*, 486 F. 2d 1127, 1131 n.5 (9th Cir. 1973):

> This policy credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of a campaign. The Board recognizes that because, as a practical matter, unions and employers cannot prevent misdeeds or misstatements by those over whom they have no control, a rule which gives the "same weight to conduct by third persons as to conduct attributable to the parties [would] substantially diminish * * * the possibility of obtaining quick and conclusive election results * * *."[4]

The courts of appeals have uniformly followed the Board's analysis of the appropriate standard for evaluating third party conduct as a basis for setting aside an election. See, *e.g.*, *NLRB* v. *Morgan Health Care Center, Inc.*, 618 F. 2d 127, 129 (1st Cir. 1980); *NLRB* v. *Van Gorp Corp.*, 615 F. 2d 759, 764 (8th Cir. 1980); *NLRB* v. *Miramar of California*, 601 F. 2d 422, 424-425 (9th Cir. 1979); *Methodist Home* v. *NLRB*, 596 F. 2d

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[4]Accord: *Matlock Truck Body & Trailer Corp.* v. *NLRB*, 495 F. 2d 671, 673 (6th Cir.), cert. denied, 419 U.S. 964 (1974); *NLRB* v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867, 870 (8th Cir. 1972).

1173, 1183 (4th Cir. 1979); *NLRB* v. *Aaron Brothers Corp.*, 563 F. 2d 409, 412 (9th Cir. 1977); *NLRB* v. *Monroe Auto Equipment Co.*, 470 F. 2d 1329, 1332 (5th Cir. 1972), cert. denied, 412 U.S. 928.[5]

The only issue raised in this case, namely, whether the conduct of petitioner's employees was so disruptive or coercive as to require invalidation of the election, does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Essentially, petitioner quarrels with the fact finding of the Board and the appropriate inferences to be drawn.[6]

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[5]Contrary to petitioner's assertion (Pet. 13-15), there is no conflict among the courts of appeals. As petitioner concedes (Pet. 13-14, 15), the Ninth Circuit, the Eighth Circuit, and the First Circuit apply the standard announced in *Orleans Mfg. Co., supra.* In *NLRB* v. *Urban Telephone Corp.*, 499 F. 2d 239, 242 (7th Cir. 1974), the court recognized the appropriate standard for evaluating third party conduct, but found that the employee's conduct in that case was attributable to the union (*id.* at 244), and therefore applied a less stringent test. Similarly, in *Exeter 1-A Limited Partnership.* v. *NLRB*, 596 F. 2d 1280 (5th Cir. 1979), *NLRB* v. *Mr. Porto, Inc.*, 590 F. 2d 637 (6th Cir. 1978), and *NLRB* v. *Gulf States Canners, Inc.*, 585 F. 2d 757 (5th Cir. 1978), the asserted misconduct was attributable to union representatives.

In *NLRB* v. *Basic Wire Products, Inc.*, 516 F. 2d 261 (6th Cir. 1975), the court held that the Board properly certified a union, without a hearing and over the employer's objections, because conclusory allegations of union misconduct are insufficient to create a material issue of fact.

[6]Petitioner states as an additional question (Pet. i) whether the Board abused its discretion in precluding petitioner from examining certain witnesses concerning their opinion of the general reputation of certain employees. Petitioner does not argue the point beyond asserting that the hearing officer's ruling was "fatally malignant" (Pet. 10). The Board held that "the testimony in question was properly excluded on grounds that it would have unnecessarily prolonged the hearing" and that petitioner "had ample opportunity to present its case and to present relevant and available evidence" (Pet. App. 1c n.2). Petitioner introduced some evidence relating to the reputation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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OCTOBER 1980

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and general conduct of the three employees whose conduct and statements formed the basis of petitioner's challenge to the election (R. 96-98, 108-109, 265-267). At the hearing, petitioner's counsel acknowledged that at least some of the excluded evidence was cumulative (R. 109). In any event, petitioner argued that the only purpose of this testimony was to establish that the three employees could have and probably did engage in the conduct alleged in the objections (R. 110-111, 166). Since the hearing officer concluded that each of the employees, Cedras, O'Guin, and Hoeppner, had engaged in the conduct alleged, petitioner suffered no prejudice.

DOJ-1980-10

Supreme Court, U.S.
FILED
NOV 21 1980
MICHAEL RODAK, JR., CLERK

No. 80-463

In the Supreme Court of the United States
OCTOBER TERM, 1980

DOMINION TOOL & DIE COMPANY, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR DOMINION TOOL & DIE COMPANY, INC., PETITIONER

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I

ARGUMENT

The purpose of this Reply is to respond to certain arguments raised in the Respondent's opposing brief.[1] The Respondent contends that "conduct of third persons tends to have less effect upon the voters than similar conduct by employers or unions." (Citation omitted) (Br.6). The Respondent's argument is unduly rigid and static in this regard. Rather, the important consideration is whether the complained-of-conduct rendered a free election impossible. *Home Town Foods, Inc. v. NLRB,* 379 F.2d241 (5th Cir. 1967).

Assuming, *arguendo,* that a "third party conduct rule" does exist, it should be accorded minimal weight especially since the subject threats were not neutralized by disavowals from the union. This lack of a union's disavowal is significant. *Dixon Distributing Co., Inc.,* 204 NLRB No.159 (1973).

The Respondent's brief, (BR. 2-4) is replete with attempts to minimize the adverse impact of threats and acts of violence, on the electorate. By way of example, the Respondent claims that an incident wherein a pro-union employee told an anti-union employee, that the latter would lose his job, if the union got in, is of no consequence. (BR. 3-4). The purported rationale for the Respondent's position is that the Union was without power to effect the threatened employee's job. It is further reasoned that the threatened employee is presumed to be capable of evaluating the lack of authority of the threatening individual to effectuate the threat. This rationale ignores the realities of the situation and opts for a surface analysis. The Court in *Owens-Corning Fiberglas Corp.,* 179 NLRB 219, enforced 435 F.2d 960 (4th Cir. 1970), provides a far better approach in analyzing comparable situations, such as the

[1] "Br." references are to the Respondent's Brief for the National Labor Relations Board in Opposition.

instant. It opined that realistic standards of human conduct must be considered together with the sophistication of the threatened employee in the labor relations area. This was not done, instantly. Of tantamount import is the case law standing for the proposition that it is commonplace for threats to be repeated and circulated amongst the electorate, and therefore the restraining effect of the coercive conduct is not limited to the employes directly involved. *Super Thrift Markets, Inc. t/a Enola Super Thrift,* 233 NLRB No. 66 (1977).

Finally, the Respondent's Brief (Br. 6) asserts that the courts of appeals have uniformly followed the Board's analysis of the appropriate standard for evaluating third party conduct as a basis for setting aside an election. However, Respondent skirts the issue, by its silence, in not addressing the lack of uniform, underlying criteria needed to give meaning and vitality to the general standard applied in cases, such as the instant one.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for a Writ of Certiorari, the Petitioner prays that its Petition be granted.

Respectfully submitted,

WEISBERG and MEISNER, P.C.

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Dated: November 11, 1980